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The time period for reply, if any, is set in the attached communication.

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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*Ex parte* ROBERT T. COLE and PRELO M. HOOD

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Appeal 2009-001952[1]
Application 10/668,297
Technology Center 3700

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Decided:[2] June 9, 2009

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Before DONALD E. ADAMS, ERIC GRIMES, and
FRANCISCO C. PRATS, *Administrative Patent Judges*.

PRATS, *Administrative Patent Judge*.

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[1] Tyco Healthcare Retail Services AG is the real party in interest (App. Br. 1).

[2] The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

## DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a visual identification device for absorbent products. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

## STATEMENT OF THE CASE

The Specification discloses "a visual identification device, such as one that may be displayed on a package or display of absorbent articles, that identifies one or more absorbent products that are part of a product line that encompasses a range of sizes and absorbencies" (Spec. 1). Thus, "[a] user may use the device to select an absorbent product that is predicted to meet the user's size and absorbency needs" (*id.*).

Claims 1, 2, 5, 6, 8-16, 18-22, 25, 27-31, 34, 35, and 37-45 stand rejected and are on appeal (App. Br. 1). Claims 1, 14, 22, 30, 40, and 43 illustrate the appealed subject matter and read as follows:

> 1. A visual identification device for absorbent products, the device comprising:
>
> two or more size designations;
> two or more absorbency designations;
> two or more absorbent product designations;
> an association between each of the two or more absorbent product designations and a combination of one of the size designations and one of the absorbency designations, wherein the association identifies one or more absorbent product designations that are predicted to satisfy a user's fit and absorbency requirements; and
> wherein the association identifies at least two absorbent product designations that correspond to one of the two or more size designations.

14. A graphical representation for absorbent products, the graphical representation comprising:

a chart having a size axis and an absorbency axis, the size axis corresponding to size designations, and the absorbency axis corresponding to absorbency designations;

two or more absorbent product designations located on the chart; and

an association between each of the two or more absorbent product designations and a combination of one of the size designations and one of the absorbency designations;

wherein the association identifies one or more absorbent product designations that are predicted to satisfy a user's fit and absorbency requirements; and wherein the association identifies at least two absorbent product designations that correspond to one of the two or more size designations.

22. A method for marking an absorbent article package, the method comprising:

marking two or more absorbent product designations;

marking two or more absorbency designations, wherein each absorbent product designation is associated with one or more absorbency designations;

marking two or more size designations, wherein each absorbent product designation is associated with one or more size designations, and at least one size designation is associated with two or more absorbent product designations associated with different absorbency designations.

30. A package for containing absorbent products comprising:

two or more size designations;

two or more absorbency designations;

two or more absorbent product designations;

an association between each of the two or more absorbent product designations and a combination of one of the size designations and one of the absorbency designations, wherein the association identifies one or more absorbent

product designations that are predicted to satisfy a user's fit and absorbency requirements; and
wherein the association identifies at least two absorbent product designations that correspond to one of the two or more size designations.

40. An absorbent product line comprising:
two or more absorbent products, whereby each of the two or more absorbent products is characterized by a combination of an absorbency designation and a size designation, and
each of the two or more absorbent products are characterized by a different combination of absorbency designation and size designation, and
at least two of the two or more absorbent products are characterized by the same absorbency designation and different size designations.

43. An absorbent product line comprising:
a plurality of packages; and
a plurality of products having a similar construction, each of the products having a size designation and an absorbency designation;
wherein each of the packages contains products having the same size designation and the same absorbency designation; and
wherein each of the packages has the same size designation and absorbency designation as the products it contains; and
wherein at least two of the packages in the product line have the same size designation and different absorbency designations.

The Examiner cites the following documents as evidence of unpatentability:

| | | |
|---|---|---|
| Glaug | US 5,649,914 | Jul. 22, 1997 |
| Ronn | US 6,648,864 B2 | Nov. 18, 2003 |

The following rejection is before us for review:

Claims 1, 2, 5, 6, 8-16, 18-22, 25, 27-31, 34, 35, and 37-45 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ronn (Ans. 3-5).

OBVIOUSNESS

*ISSUE*

The Examiner cites Ronn as disclosing a visual identification device for absorbent articles, the device having "two or more size designations and two or more product designations" (Ans. 4). The Examiner concedes that Ronn "does not specifically disclose two or more absorbency designations" (*id.*).

However, the Examiner contends, "because the display designates different sizes and different stages of development, it would have been obvious to one of ordinary skill in the art at the time the invention was made to inform the consumer about different absorbencies" (*id.*). The Examiner reasons that including absorbency designations on Ronn's device would have been obvious "since the general concept is to provide a fit appropriate for the child's state of development and it is considered obvious that different sizes and particularly different stages of development, such as a training pant, has different levels of absorbency" (*id.*). As an example, the Examiner cites Glaug as disclosing "a toilet training aid with a low absorbency" (*id.*).

With respect to claim 1:

> It is Appellant's position that Ronn et al. fail to teach or suggest "absorbency designations" or "at least two absorbent product designations that correspond to one of the two or more size designations," in which there is "an association between

> each of the two or more absorbent product designations and a combination of one of the size designations and one of the absorbency designations."

(App. Br. 9.)

Specifically, Appellants argue, the Examiner's rejection is based on the erroneous assumption that a child's size and state of development are necessarily linked to the absorbency of the worn articles (*id.*). The Examiner's assumption is incorrect, Appellants urge, because, "[f]or example, some users may require a small size absorbent article but at the same time have higher absorbency needs" (*id.* at 10). Also, Appellants urge, "[i]n the context of the 'stages of development' designation described in Ronn et al., diapers of different sizes might be expected to inherently have different levels of absorbency, but diapers configured for different stages of development would not necessarily be expected to require different levels of absorbency" (*id.*).

Appellants further contend that, "[w]ith perhaps the sole exception of training pants (which deliberately have less than the 'required' absorbency), . . . the same size child is typically expected to require the same level of absorbency without regard to stage of development (absent unusual circumstances, such as perhaps a medical condition)" (*id.*). Thus, Appellants argue, adding absorbency designations to Ronn's system "would seem to add unnecessary complexity, and may even make that system confusing, because there is no necessary correlation between absorbency and the other designations" (*id.*).

Ultimately, Appellants argue, "[n]either size nor different stages of development have any necessary correlation to absorbency in the context of

that system, such that the addition of absorbency designations would serve no useful purpose" (*id.*). Appellants conclude, therefore, that "apart from Appellant's own disclosure, there is no teaching or suggestion to modify Ronn et al. in the manner suggested by the Examiner to include absorbency designations and to correlate such absorbency designations with either the size or stage of development designations" (*id.*).

Appellants apply the same reasoning in arguing that independent claims 14, 22, 30, 40, 42, 43, and 45 would have been unobvious to an ordinary artisan (*see* App. Br. 11-16).

In view of the positions advanced by Appellants and the Examiner, the issue with respect to this rejection is whether the Examiner erred in concluding that a person of ordinary skill in the art, advised by Ronn of the desirability of applying designations relating to the size and stage of development of the child wearers of absorbent articles in a product line, would have considered it obvious to also apply, to the articles or their packaging or the accompanying merchandising materials, designations relating to the articles' absorbency.

*FINDINGS OF FACT ("FF")*

1. Ronn discloses "an array of disposable absorbent article configurations comprising a sequence of designs corresponding to a wearer's stages of development and a merchandising system for identifying the configuration of absorbent article which matches a wearer's stage of development" (Ronn, col. 3, ll. 31-36).

Thus, "the array may include a first absorbent article configuration designed for newborns and immobile infants, a second absorbent article configuration designed for a toddler in the crawling stage, and/or other

absorbent article configurations designed for subsequent stages of development" (*id.* at col. 3, ll. 36-41).

2. Ronn discloses that the merchandising system includes indicia in the form of "pictorial representations of the absorbent article configurations fitted to wearers at respective stages of development enabling a consumer to identify the appropriate configuration that matches a particular wearer's stage of development. The system is particularly useful for merchandising multiple absorbent article configurations that are available in overlapping size ranges" (Ronn, col. 3, ll. 42-49).

3. Figure 1 of Ronn is reproduced below:

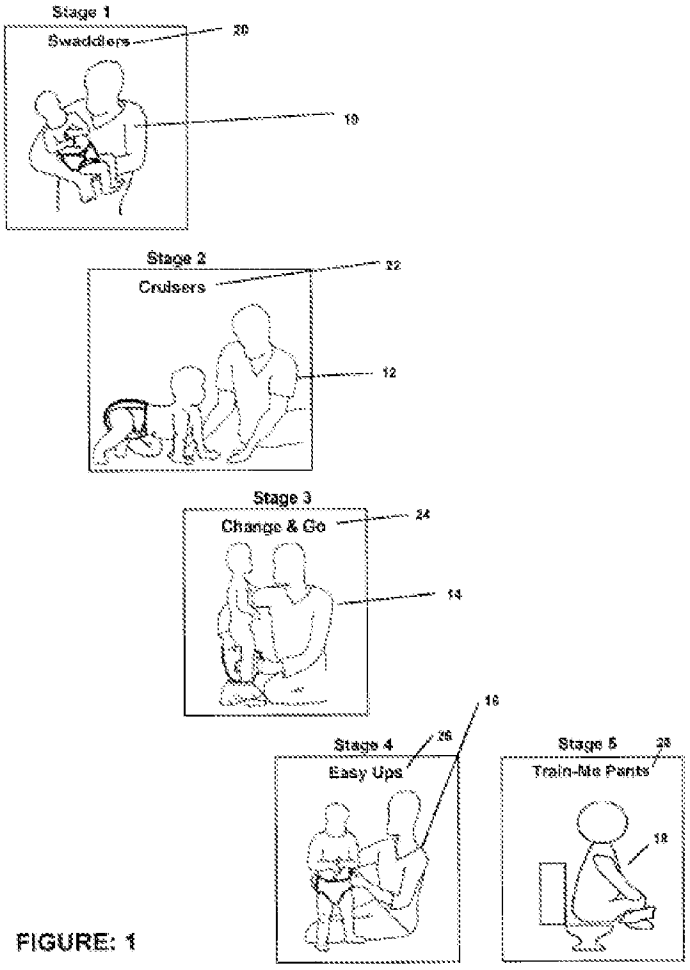


FIGURE: 1

Figure 1 shows "indicia exhibiting pictorial representations of absorbent article configurations fitted to wearer's [sic] at corresponding stages of development" (Ronn, col. 2, ll. 58-60).

4. Thus, "[b]y matching the stage of development of a wearer with the stage of development exhibited by the indicia, the consumer can choose the right product configuration for their particular wearer" (Ronn, col. 5, ll. 36-39).

Ronn discloses that the "indicia may be provided on a display panel disposed above the store shelves on which the absorbent article configurations are displayed for sale. Alternatively, the indicia may be disposed on packaging for the different absorbent article configurations or in advertisements disseminated to the public" (*id.* at col. 5, ll. 39-44).

5. Ron discloses that its merchandising system may also use different product names that associate each product "with the particular stage of development for which the product is designed. For instance, the first absorbent article configuration could be named Swaddlers 20, while the second, third, fourth, and fifth product configurations could be named Cruisers 22, Change & Go 24, Easy Ups 26 and Train-Me Pants 28, respectively" (Ronn, col. 5, ll. 47-53).

6. Figure 2a of Ronn is reproduced below:

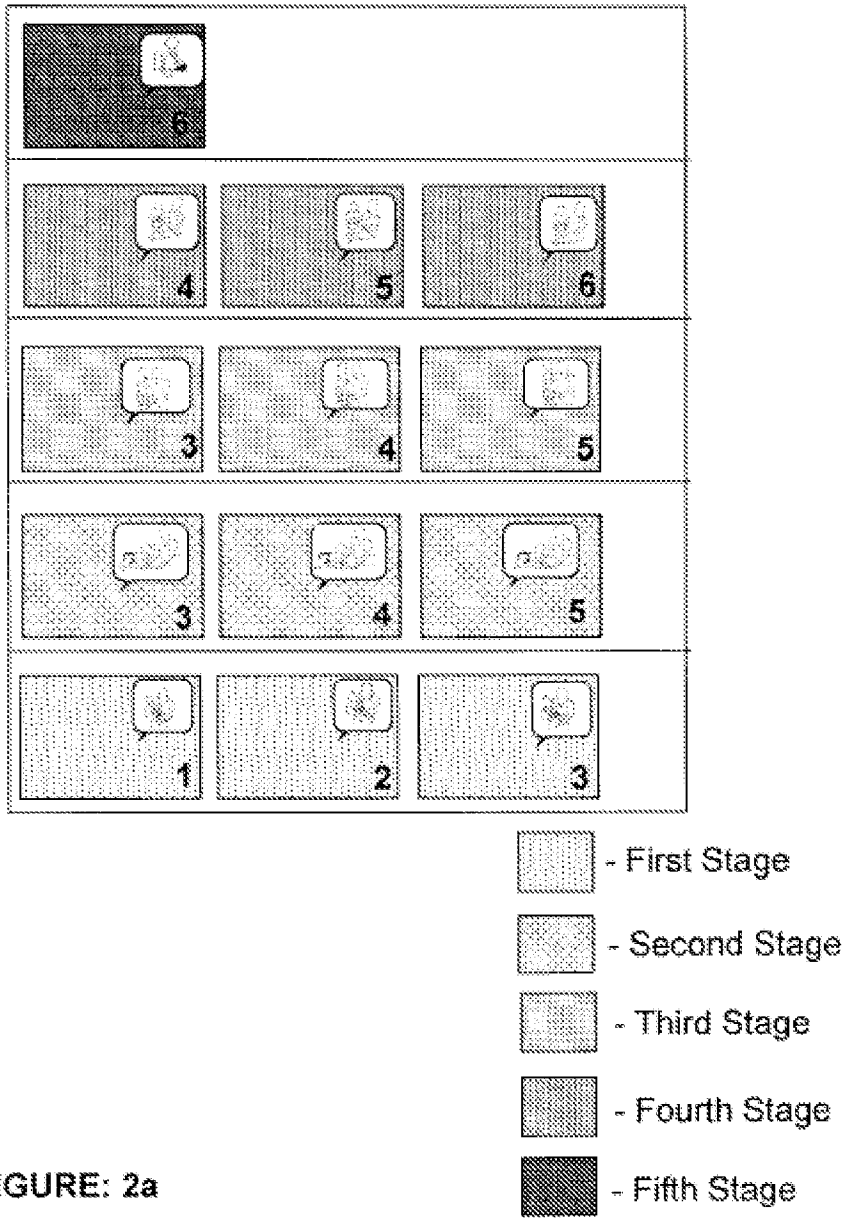


FIGURE: 2a

Figure 2a "illustrates a store display of absorbent article configurations having chassis designed to match a wearer's stage of development comprising a vertical arrangement where each shelf carries a different stage of development" (Ronn, col. 2, ll. 61-64).

7. As seen in Figure 2a of Ronn, in addition to displaying the pictorial representations of the wearers' stages of development, "sizes for each of the

absorbent article configurations, [designated by the numbers 1 through 6,] are arranged horizontally in the second sequential order with increasing sizes progressing from left to right" (Ronn, col. 6, ll. 6-9).

As also seen in Figure 2a, the size 6 article is available in both the toilet training pant, and the fourth stage easy pull-up chassis.

8. Figure 4a of Ronn is reproduced below:

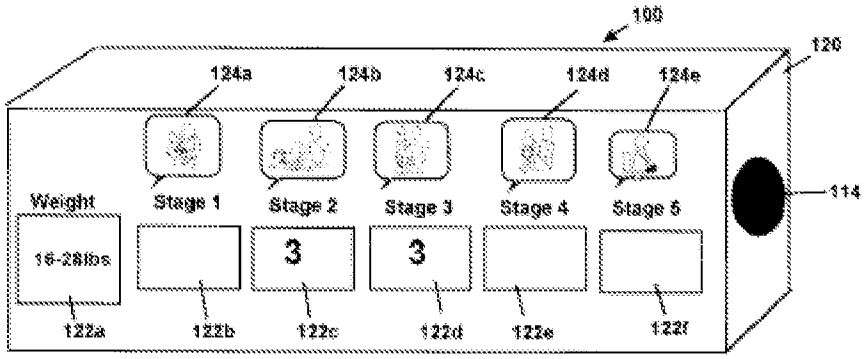


Figure: 4a

Figure 4a shows "a rotary cylinder type selection device used to facilitate a consumer's selection of the appropriate absorbent article configuration matching a particular wearer's stage of development" (Ronn, col. 3, ll. 9-12).

As seen in Figure 4a, the device shows not only the stage of development of the wearer, but also the wearer's weight and corresponding diaper size.

9. Glaug discloses that attempts at toilet training children have included training pants "with a bodyside liner material that retains moisture. These so called 'wet liners' provide the child with a damp sensation which is thought to be noticeable" (Glaug, col. 1, ll. 33-36).

10. Glaug discloses a toilet training aid "in the form of a pad that creates a noticeable, distinct feeling during urination. In particular embodiments, the pad may provide the wearer with a temperature change sensation, *a wet sensation*, a dimensional change sensation, or some combination thereof to signal that urination is occurring" (Glaug, abstract (emphasis added)).

*PRINCIPLES OF LAW*

In *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), the Supreme Court reaffirmed that it is obvious to choose from among known solutions to a problem:

> When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense. In that instance the fact that a combination was obvious to try might show that it was obvious under § 103.

*Id.* at 421.

The Court also recognized:

> [I]t can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements *in the way the claimed new invention does* . . . because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known.

*Id.* at 418-419 (emphasis added); *see also id.* at 418 (requiring a determination of "whether there was an apparent reason to combine the known elements *in the fashion claimed* by the patent at issue") (emphasis added).

While holding that some rationale must be supplied for a conclusion of obviousness, the Supreme Court nonetheless rejected a "rigid approach" to the obviousness question, and instead emphasized that "[t]hroughout this Court's engagement with the question of obviousness, our cases have set forth an expansive and flexible approach . . . ." *KSR,* 550 U.S. at 415. The Court also rejected the use of "rigid and mandatory formulas" as being "incompatible with our precedents." *Id.* at 419; *see also id.* at 421 ("Rigid preventative rules that deny factfinders recourse to common sense, however, are neither necessary under our case law nor consistent with it.").

The Court thus reasoned that the analysis under 35 U.S.C. § 103 "need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ." *Id.* at 418; *see also id.* at 421 ("A person of ordinary skill is . . . a person of ordinary creativity, not an automaton.").

*ANALYSIS*

Appellants' arguments do not persuade us that the Examiner erred in concluding that a person of ordinary skill in the art, advised by Ronn of the desirability of applying designations relating to the size and stage of development of the intended wearers of absorbent articles in a product line, would have considered it obvious to also apply, to the articles or their packaging or the accompanying merchandising materials, designations relating to the articles' absorbency.

It may be true that Ronn does not explicitly disclose that the articles in its product line have different absorbencies. However, as disclosed by Glaug, one method of toilet training children is to provide training pants that

give the wearer a wet sensation upon urination (FF 9, 10). Thus, as the Examiner argues (Ans. 5), and Appellants concede (App. Br. 10), a person of ordinary skill in the art would have reasonably inferred that toilet training pants, including the training pants in Ronn's product line, would be less absorbent than other absorbent articles in a diaper product line.

Ronn also discloses that the training pants can be the same size as the pull-ups provided to children in the developmental stage preceding toilet training (FF 6, 7). Because an ordinary artisan would have understood that training pants require less absorbency than pull-ups, it would have been reasonable to infer that, despite their identical size, Ronn's same-sized training pants and pull-ups would have required different absorbencies.

Because a person of ordinary skill in the art would have reasonably inferred that articles in Ronn's product line would have different absorbencies, despite identical sizing, we agree with the Examiner that an ordinary artisan would have considered it desirable to put absorbency-related indicia on Ronn's products or packaging or merchandising material, so as to inform the consumer of the articles' absorbency. We therefore also agree with the Examiner that the device of claim 1, the graphical representation of claim 14, method of claim 22, packaging of claim 30, and product lines of claims 40 and 43, would have been obvious to a person of ordinary skill in the art.

It may be true, as Appellants argue, that the absorbency of an article is not necessarily related to its size, or the stage of development or level of activity of the intended wearer. However, even assuming for argument's sake that smaller articles of the type disclosed by Ronn might be made more absorbent by using materials with higher absorbency, and that larger articles

might be made less absorbent, we do not agree that this demonstrates the unobviousness of the claimed subject matter.

Rather, in our view, a person of ordinary skill in the art, being a person of ordinary creativity and common sense, *KSR*, 550 U.S. at 418, 421, aware of the lack of relationship between diaper absorbency and diaper size, would have reasoned that it would be desirable to place indicia relating to absorbency on the diapers or their related merchandising materials so as to inform the consumer whether the product possessed the properties the consumer desired.

Moreover, we do not agree that an ordinary artisan would have inferred that simply adding absorbency-related indicia to Ronn's product line would make the product line so complex as to render it undesirable to consumers. We are therefore not persuaded that Ronn teaches away from the claimed subject matter.

In sum, we agree with the Examiner that a person of ordinary skill in the art would have considered it desirable to put absorbency-related indicia on Ronn's products or packaging or merchandising material, so as to inform the consumer of the articles' absorbency. Appellants' arguments therefore do not persuade us that the Examiner's conclusion of obviousness with respect to claims 1, 14, 22, 30, 40, and 43 is erroneous, and we affirm the Examiner's rejection of those claims.

Because the remaining claims subject to this ground of rejection were not argued separately, they fall with claims 1, 14, 22, 30, 40, and 43. *See* 37 C.F.R. § 41.37(c)(1)(vii).

## SUMMARY

We affirm the Examiner's rejection of claims 1, 2, 5, 6, 8-16, 18-22, 25, 27-31, 34, 35, and 37-45 under 35 U.S.C. § 103(a) as being unpatentable over Ronn.

## TIME PERIOD

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

## AFFIRMED

Ssc:

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